No. 14-18-00600-CR

In the Court of Appeals
For the Fourteenth District of Texas
At Houston

◆

No. 2130699
In County Criminal Court at Law Number Ten
Of Harris County, Texas

◆

Phi Van Do
Appellant

v.

State of Texas
Appellee

◆

State's Motion for Rehearing

◆

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Table of Contents

Table of Contents 2

Index of Authorities 3

Ground for Rehearing 4

This Court's opinion conflicts with *Niles*, where a different panel of this Court applied the "egregious harm" standard to the unobjected-to omission of an element from the jury charge. This case also involves an unobjected-to omission of an element from the jury charge, so this Court should grant rehearing and apply the "egregious harm" standard. 4

The omission of the .15 element from the jury charge was not egregiously harmful.....6

Conclusion 8

Certificate of Compliance and Service 9

Index of Authorities

Cases

Almanza v. State
686 S.W.2d 157 (Tex. Crim. App. 1984) 5

Navarro v. State
469 S.W.3d 687 (Tex. App.—
Houston [14th Dist.] 2015, pet. ref'd) 7

Niles v. State
___ S.W.3d ___, No. 14-15-00499-CR, 2019 WL 3121781 (Tex. App.—
Houston [14th Dist.] July 16, 2019, no pet. h) 4, 6, 7

Niles v. State
555 S.W.3d 562 (Tex. Crim. App. 2018) 4

Taylor v. First Cmty. Credit Union
316 S.W.3d 863 (Tex. App—
Houston [14th Dist.] 2010, no pet.) 5

Statutes

TEX. CODE CRIM. PROC. art. 36.14..... 5

TEX. PENAL CODE § 49.04..... 7

Ground for Rehearing

This Court's opinion conflicts with *Niles*, where a different panel of this Court applied the "egregious harm" standard to the unobjected-to omission of an element from the jury charge. This case also involves an unobjected-to omission of an element from the jury charge, so this Court should grant rehearing and apply the "egregious harm" standard.

In *Niles v. State*, ___ S.W.3d ___, No. 14-15-00499-CR, 2019 WL 3121781 (Tex. App.—Houston [14th Dist.] July 16, 2019, no pet. h), a panel of this Court held that the unobjected-to omission of an element from the jury charge is jury charge error will lead to appellate reversal only if it causes egregious harm. This Court denied Niles's motion for *en banc* reconsideration the same day the opinion here was released.

This case also involved an omitted element from the jury charge. In its brief, relying on a Colorado case cited in the Court of Criminal Appeal's earlier opinion in *Niles*, the State asserted this was constitutional error subject to the harmless-beyond-a-reasonable-doubt standard. While the error in *Niles* was unobjected-to, the Court of Criminal Appeals did not address preservation in its opinion. *See generally Niles v. State*, 555 S.W.3d 562 (Tex. Crim. App. 2018). In its opinion here, this Court applied the harmless-beyond-a-reasonable-doubt standard and concluded reversal was appropriate.

After reviewing this Court's now-final opinion in *Niles*, it is apparent the egregious harm standard should apply to this case as well. The appellant did not object to the trial court's failure to include the enhancement element in the jury charge. (*See* 3 RR 74-77 (charge conference)). Defense counsel did not mention the matter until the beginning of the punishment phase, thus this objection was untimely. *See* TEX. CODE CRIM. PROC. art. 36.14 (requiring objection to jury charge before charge is read to jury); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984)(op. on reh'g)(requiring "timely" objection for defendant to avoid "egregious harm" standard on appeal). And the complaint he made was not about the jury charge.

"Absent a decision from a higher court or this court sitting en banc that is on point and contrary to the prior panel decision or an intervening and material change in the statutory law, this court is bound by the prior holding of another panel of this court." *Taylor v. First Cmty. Credit Union*, 316 S.W.3d 863, 869 (Tex. App—Houston [14th Dist.] 2010, no pet.). Because the opinion here conflicts with a prior opinion from a different panel of this Court, this Court should withdraw its opinion and evaluate harm under the "egregious harm" standard.

The omission of the .15 element from the jury charge was not egregiously harmful.

Niles described the egregious harm standard:

> Egregious harm occurs when the error affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory. Egregious harm is a difficult standard to prove, and such a determination must be done on a case-by-case basis. Errors that result in egregious harm are those that affect the very basis of the case, deprive the defendant of a valuable right, or vitally affect a defensive theory. The record must show that a defendant has suffered actual, rather than merely theoretical, harm from jury instruction error. In the egregious-harm analysis we consider (1) the charge itself; (2) the state of the evidence including contested issues and the weight of the probative evidence; (3) arguments of counsel; and (4) any other relevant information revealed by the trial record as a whole.

Niles, 2019 WL 3121781, at *2 (quotations and citations omitted).

Here, just like *Niles*, the charge omitted an element, which weighs in favor of reversal.

Here, just like *Niles*, evidence proving the omitted element was submitted to the jury. Here, like *Niles*, the evidence of the omitted element was essentially uncontested. While a conviction for driving while intoxicated requires the State to prove actual intoxication when the defendant was actually operating a motor vehicle—which, in cases of breath or blood tests, can involve questions about retrograde extrapola-

tion, how the test was conducted, and the reliability of the testing device—all that is required for the .15 element is to show "an analysis of a specimen of the [defendant's] blood, breath, or urine showed an alcohol concentration level of 0.15 or more at the time the analysis was performed." TEX. PENAL CODE § 49.04(d). Here, the jury found the defendant was intoxicated when he was driving. And the breath test showed an alcohol concentration of .194 when the test was conducted. (State's Ex. 5). There was no evidence or argument that the test result did not show a blood alcohol concentration of .15 or above. *Cf. Navarro v. State*, 469 S.W.3d 687, 697 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd)(where test of defendant's blood plasma showed alcohol concentration of .158, which State's witness explained meant defendant's blood alcohol concentration was .132, evidence was insufficient to prove .15 element). Just like *Niles*, where the omitted element was another objective fact—is a firefighter a public servant?—this weighs against reversal. In *Niles*, this Court assessed the arguments of the parties by looking at whether the defendant ever contested the omitted element. *Niles*, 2019 WL 3121781, at *2. Here, the primary defense was that the appellant was detained illegally. While the appellant argued his breath test results were incongruous with his appearance in videos, he never argued

that if he was intoxicated the test results were less than .15. This weighs against reversal.

The omission of the .15 element was error, but that element is an objective fact proved by essentially uncontested evidence. After the jury returned a finding that the appellant was intoxicated, finding that .194 is greater than .15 was a foregone conclusion. At a bare minimum, the failure to submit the .15 element to the jury was not egregiously harmful.

Conclusion

The State asks this Court to grant rehearing, issue an opinion consistent with *Niles*, and affirm the trial court's judgment.

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